No. 6416

IN THE

United States Circuit Court of Appeals For the Ninth Circuit

STANDARD SANITARY MANUFACTURING COMPANY, a Corporation,

vs. Appellant,

MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation, PRATT-GILBERT HARDWARE COMPANY, a Corporation, UNION OIL COMPANY OF ARIZONA, a Corporation, PHOENIX PLUMBING & HEATING COMPANY, a Copartnership composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners, LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, as Individuals, WILLIAM L. HART, as Trustee in Bankruptcy of the PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners, Bankrupts, and CRANE COMPANY, a Corporation,

Appellees.

MOTION FOR REHEARING

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TOPICAL INDEX

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Comes now the Standard Sanitary Manufacturing Company, appellant in the above entitled cause, and moves the Court for a rehearing on the decision rendered by this Court on the twenty-ninth day of July, 1931, in which decision it was held by this Court that the appeal

must be dismissed because it did not come within the purview of Section 25 of the Bankruptcy Act as amended, no application having been made to this Court for a review.

PROPOSITIONS.

This motion for rehearing is based upon the following propositions:

1. That under the Third Assignment of Error filed in this case, and a part of the original record before this Honorable Court, together with the supplemental brief of appellant filed on the twenty-eighth day of May, 1931, in this Court in answer to the motion to dismiss, coupled with the verbal statement made in the opening argument by counsel for appellant to the effect that this appeal was argued upon the proposition that the question of insolvency prior to July 20, 1929, not being proven, the order for adjudication in bankruptcy based thereon was void.

2. That in the argument it was expressly stated by counsel for appellant that the statements in the opening brief confining the appeal to the Lincoln Mortgage Company and raising no question as to the validity of the finding of bankruptcy of the Special Master and the Court as of August 27, 1929, were repudiated, and the complete reliance upon the Third Assignment of Error and the question of insolvency therein raised, entitled this appellant to a review of the merits; as to whether there was sufficient evidence to warrant the findings of fact and conclusions of law of the Special Master and

confirmed by the District Court of the United States, and upon which the adjudication in bankruptcy of August 27, 1929, was based, and with that question the second and most important question upon all the facts in the record is: Was the Phoenix Plumbing & Heating Company, as a matter of law, insolvent on the twentieth day of July, 1929.

ARGUMENT.

Under the provisions of Section 24 (B) of the Bankruptcy Act, as amended, any appeal from a proceeding in bankruptcy, as distinguished from a controversy in bankruptcy, must be allowed by the Circuit Court of Appeals, except as to three specific causes enumerated in Section 25, otherwise a right of appeal through the District Court's allowance of the same is provided. The three acts in a bankruptcy case which are appealable under Section 25 are: (1) An adjudication or refusal to adjudicate in bankruptcy; (2) the allowance or rejection of a claim in excess of $500.00, and (3) the granting or refusal to grant a discharge in bankruptcy.

Obviously, any proceeding in bankruptcy which involves matters between the trustee and creditors, or the bankrupt, is a proceeding under the adjudicated cases reviewable only under Section 24 (B).

In this case it is our contention that the appeal perfected herein in accordance with the provisions of Section 25 was proper for the reason that said appeal was

based upon and could only result in the confirmation or rejection of the decree of the District Court adjudicating the Phoenix Plumbing & Heating Company a bankrupt.

This motion for rehearing is based upon our conviction that this Honorable Court has overlooked the third Assignment of Error and the propositions advanced in the supplemental brief of appellant in answer to the motion to dismiss filed in this Court on the twenty-eighth day of May, 1931, and we respectfully call the Court's attention to the following facts appearing in this case: In all bankruptcy cases inaugurated by an involuntary petition, a motion to dismiss the petition, or the raising of an issue by the bankrupt or a creditor as to the allegations in the involuntary petition, are all preliminary steps which must of necessity result in one of two decisions by the District Court. The District Court must decide whether or not the alleged bankrupt should be adjudicated in bankruptcy, and enter a decree to that effect. The adjudication or refusal to adjudicate is the first decisive step in bankruptcy and cannot be construed as a proceeding in bankruptcy, as it is expressly excepted from the designation of a proceeding in bankruptcy by the provisions of Section 25 which reserves the right to appeal in equity cases for an adjudication or a refusal to adjudicate in bankruptcy. The only pleadings that can be filed in a bankruptcy case prior to the adjudication or refusal to adjudicate are: (1) The petition; (2) a motion to dismiss; (3) an answer on the part of the bankrupt or creditors controverting the allegations of the involuntary petition. No final action can result in the Federal Court

on any or all of the above except in an adjudication or refusal to adjudicate. The first final order that could under any phase of Federal pleading be subject to appeal is therefore the adjudication.

Therefore, proceedings in bankruptcy which are subject to the provisions of Section 24 (B) cannot come into existence in the Federal Court until after the adjudication.

We submit, therefore, that if this motion to dismiss is to be tested by this Court, it can only be tested upon what the result would be if upon the merits the Court should find that the whole proceedings were irregular and that insolvency was not proven until the twentieth day of July, 1929. Every act of bankruptcy alleged in the involuntary petition, and every act of bankruptcy brought to light in the Master's Report, which was confirmed by the Judge of the District Court, took place not later than the sixth day of June, 1929.

Every allegation in the involuntary petition was based upon the following:

> "That the act complained of was committed *while insolvent,* and with intent to prefer one creditor over the other."

Hence, if upon examination of the record in this case the Court should find that no insolvency was proven until the twentieth of July, 1929, there could be no adjudication, and this Court would have to decide that the

Phoenix Plumbing & Heating Company was wrongfully adjudicated a bankrupt by the District Court, or that the evidence submitted made the Phoenix Plumbing & Heating Company in law a bankrupt on the seventeenth day of August, 1929.

Referring to the statement of counsel for appellant in its brief, we wish to call the Court's attention to the following language on page 5 thereof, lines 10 to 19:

> "Counsel for appellant stands by the statement in its brief which is quoted in full on page 5 of appellees' motion to dismiss, in which appellant stated 'that it confines its appeal to the findings of fact and conclusions of law covering the so-called Lincoln Mortgage Company transaction and the question of *insolvency prior to the 20th day of July,* 1929,' and we contend that the question of insolvency raised in the appeal here opens the whole record of the Court, and that upon all the facts in the record there is an issue on appeal which this court has jurisdiction to decide under the provisions of Section 25."

We contend, therefore, that the above quotation raises squarely before this Court the question of insolvency as of July 20, 1929, and that the raising of that question brings squarely before the Court whether or not upon all of the record the decision of the District Court adjudicating the Phoenix Plumbing & Heating Company a bankrupt as of August 17, 1929, was error, and we contend further that this issue having been raised by the appeal, the appellant herein is entitled to have the case considered on its merits as it is rightfully within the

jurisdiction of this Court under the provisions of Section 25.

BRIEF.

There is a wide divergence of opinion among the various Circuit Courts of Appeal on the proper construction of Section 24 (B) and Section 25 in the line of the amendments to the Bankruptcy Act of 1926, and the amendments of the Federal Practice Act in January, 1928. On January 31, 1928, Congress passed an amendment to Title 28, of the United States Statutes, which are contained in Paragraph 861 A and B, and which is supplementary to the Act of February 13, 1925, now embodied in Paragraph 861, Title 28, U. S. C.

A conclusion that this amendment of January 31, 1928, supersedes the amendment of 1926 to the Bankruptcy Act is apparently growing in the various Circuit Courts of Appeal. The Fourth Circuit followed the above amendments in a bankruptcy case in 1928 in deciding the case of *Columbia Gas & Electric Company vs. State of South Carolina,* 27 Federal (2nd) 52, affirming 25 Federal (2nd) 329. The facts in that case were briefly as follows: The appeal from the District Court was for the adjudication of bankruptcy of the Columbia Gas & Electric Company, and a stay of mandamus proceedings against it in the Supreme Court of South Carolina inaugurated by the State of South Carolina. In the case reported in 25 Federal (2nd) 329, the District Court Judge called the petitioner's attention to what is known as Section 861 A and B of the United States Code, and

in accordance with his interpretation thereof the petitioner filed an appeal, as provided in Section 25 of the Bankruptcy Act. The Circuit Court of Appeals in 27 Federal (2nd) 52, held that this was good and adopted the view of the District Court Judge in regard to the effect of an appeal perfected under either mode holding that the appeal was good because of the amendments of 1928. This is a complete change from the decision of the United States Supreme Court in the case of *Harold Taylor, Trustee, vs. Voss,* 70 L. Ed. 889, 271 U. S. 176, and to our minds rightly so for the reason that at the time the United States Supreme Court decided the *Taylor, Trustee*, case, the amendment to Title 28 had not been passed.

The amendment of 1926 to the Bankruptcy Act and the amendment of 1928 to the Federal Judiciary Act was the result of a wide-spread demand in the United States for a simplification of the very complicated methods of appeal to the Circuit Court of Appeals and the Supreme Court of the United States in effect prior to that time, and it appears to us that the Circuit Court of the Fourth District in deciding the case of *Columbia Gas & Electric Co. vs. State of South Carolina, supra,* had in mind the intent behind these amendments, viz., the desire of Congress and the Courts to simplify the methods of appeal then in effect. But admitting for the sake of argument herein that this Court is governed solely by the provisions of Section 24 (B) and Section 25, as amended by the Act of 1926, in this case the decisions as to which section governs decrees and final judgments

in bankruptcy are to the effect that where the final decision of the District Court grants or denies an adjudication in bankruptcy, an appeal under Section 25 perfected in the District Court will lie, and gives this Court full jurisdiction to examine the case on its merits. See also:

Ringling Trust & Savings Bank, et al., vs. Whittfield Estates, 32 Federal (2nd) 92.

We respectfully submit two lines of cases, first on the proposition that the result of this appeal on its merits brings the case clearly within the provisions of Section 25, and, second, that it could not under any theory be appealable under the provisions of Section 24.

The case of *Slattery vs. Dillon*, 17 Federal (2nd) 347, held that the action of the Referee in Bankruptcy in ordering the attorney for the bankrupt to return certain moneys into Court received by the attorney during the four months prior to bankruptcy, was within the purview of Section 25 because it was in the nature of an adjudication for or against a claim in excess of $500.00, though a motion was made to dismiss upon the ground that it could be appealed only upon a petition to revise for the reason that it was a proceeding in bankruptcy. In that case this Court held that where there was a color of one of the three rights created under Section 25, an appeal under that section would lie. It is our contention that in the instant case we have more than a color, and that this appeal on the merits must result in a confirmation or reversal of an adjudication in bankruptcy just as in the case of *Slattery vs. Dillon, supra.* There it was

decided that "the order amounts to the disallowance of a claim appealable under Section 25-A (3)." Apparently in that case this Court applied the very test we are asking for here, that is to say, what effect would the appeal on its merits have, and held that if the effect of the appeal on the merits was to decide upon the allowance or disallowance of a claim in excess of $500.00, then Section 25 applied and the appeal was well taken. The analogy of this case to the case at bar is obvious. A decision of this case upon the merits would confirm or reverse the adjudication in bankruptcy, hence, the appeal was properly brought and is within the jurisdiction of this Court.

See also:

Pratt vs. Bothe, 130 Federal 670,

quoted with approval by this Court in *Slattery vs. Dillon, supra.*

So, too, in the case of *Chappel vs. Brainerd,* 8 Federal (2nd) 987, this Court held that where the question before the Court was based on a judgment allowing or rejecting a debt or claim of $500.00, or over, a petition to revise would not lie. So generally on the question of the allowance of appeals, see:

Triangle Electric Co. vs. Foutch,
40 Federal (2nd) 353,

which discusses at length the distinction between appeals under Sections 24 and 25.

Burns Bros., et al., vs. Cook Coal Co.,
42 Federal 109.
In re Cooperative League of America,
22 Federal 725.

These cases show the distinction between the two classes of appeals and bear out our contention that the instant case, having to do solely with an adjudication in bankruptcy, comes within the provision of Section 25. The latest case upon the real effect of the amendment of May 27, 1926, to the Bankruptcy Act, showing that it is well settled that that amendment did not do away with appeals under Section 25, is,

Rutherford vs. Elliott, 18 Federal (2nd) 956.

We do not find in any of the cases any decisions whereby an appeal, which upon the merits would have the effect of deciding any one of the three following classes of orders or decrees, have been construed to come within the purview of Section 24 (B): (1) any order or decree, the refusal of which would have the effect of adjudicating or refusing to adjudicate in bankruptcy; (2) the refusal to allow or disallow a claim for $500.00 or over, or, (3) any order or decree discharging or refusing to discharge a bankrupt. On the contrary, in all of the cases on the vexatious questions of appeals and petitions to revise wherever any one of the three above named orders or decrees were involved, it has been expressly

held that Section 25 provides for appeal direct from the District Court without first petitioning this Court, giving to this Court full jurisdiction to consider the appeal on its merits.

We submit, therefore, that this case comes clearly within the provision of Section 25, and request this Honorable Court to examine carefully Assignment of Error No. 3 in the record, together with the statements contained in our supplemental brief and in this petition and to grant a motion for a rehearing.

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ROBERT H. ARMSTRONG,
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Attorneys for Standard Sanitary Manufacturing Company.

CERTIFICATE OF COUNSEL.

UNITED STATES OF AMERICA
DISTRICT OF ARIZONA
County of Coconino
} *ss.*

I, FRANK J. DUFFY, one of the counsel for STANDARD SANITARY MANUFACTURING COMPANY, a corporation, appellant, pursuant to Rule 29, Rules of the United States Circuit Court of Appeals for the Ninth Circuit, DO HEREBY CERTIFY AND DECLARE that I have read the within and foregoing Petition and Motion for Rehearing, and the grounds stated in support thereof, and, in my judgment, said Petition and Motion for Rehearing is well founded and the same is not interposed and filed for the purpose of delay.

DATED at Flagstaff, Arizona, this 19th day of August, A. D. 1931.

Frank J. Duffy

(Frank J. Duffy)